

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRIAN DAVID MATTHEWS,

Plaintiff,

V.

WASHINGTON DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

CASE NO. 3:15-CV-05795-BHS-JRC

REPORT AND RECOMMENDATION

NOTED FOR: FEBRUARY 12, 2016

This 42 U.S.C. §1983 civil rights matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. §§ 636 (b)(1)(A) and (B) and Local Magistrate Judge Rules MJR 1, MJR 3, and MJR 4. Before the Court is defendants' motion to dismiss. Dkt. 15.

Plaintiff alleges that while incarcerated at Stafford Creek Corrections Center (“SCCC”) defendants returned his incoming mail to the sender. *See* Dkt. 11. Defendants argue that plaintiff has failed to state a claim and move to dismiss plaintiff’s complaint under Federal Rule of Civil Procedure 12(b)(6). *See* Dkt. 15.

The return of improperly addressed mail to the sender does not constitute a rejection of incoming mail that entitles plaintiff to procedural due process safeguards. Thus, the Court

1 recommends granting defendants' motion but allowing plaintiff leave to amend his complaint
 2 with respect to his due process claim and any alleged facts supporting personal participation of
 3 the named defendants. The remainder of plaintiff's claims should be dismissed without leave to
 4 amend.

5 **STANDARD OF REVIEW**

6 A court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) of
 7 the Federal Rules of Civil Procedure "if it appears beyond doubt that the plaintiff can prove no
 8 set of facts in support of his claim that would entitle him to relief." *Keniston v. Roberts*, 717 F.2d
 9 1295, 1300 (9th Cir. 1983) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1990)). Mere
 10 conclusory statements in a complaint and "formulaic recitation[s] of the elements of a cause of
 11 action" are not sufficient. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Chavez v.*
 12 *United States*, 683 F.3d 1102, 1108-09 (9th Cir. 2012). "Dismissal can be based on the lack of a
 13 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
 14 theory." *Ballistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

15 On a motion to dismiss, material allegations of the complaint are taken as admitted and
 16 the complaint is to be liberally construed in favor of the plaintiff. *Jenkins v. McKeithen*, 395 U.S.
 17 411, 421 (1969), *reh'g denied*, 396 U.S. 869 (1969); *Sherman v. Yakihi*, 549 F.2d 1287, 1290
 18 (9th Cir. 1977). When a plaintiff is proceeding *pro se*, his allegations must be viewed under a
 19 less stringent standard than allegations of plaintiffs represented by counsel. *Haines v. Kerner*,
 20 404 US 519 (1972), *reh'g denied*, 405 U.S. 948 (1972); *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.
 21 1 (9th Cir.1985) (en banc) (petitioner should be afforded the "benefit of any doubt").

22 While the court can liberally construe a plaintiff's complaint, it cannot supply an essential
 23 fact an inmate has failed to plead. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (*quoting*
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1 *Ivey v. Board of Regents of University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). The court
 2 need not accept as true unreasonable inferences or conclusory legal allegations cast in the form
 3 of factual allegations. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

4 **MATERIALS FOR CONSIDERATION**

5 When resolving a motion to dismiss for failure to state a claim, a district court may not
 6 consider materials outside the complaint and the pleadings. *See Gumataotao v. Dir. of Dep't of
 7 Revenue & Taxation*, 236 F.3d 1077, 1083 (9th Cir. 2001); *Cooper v. Pickett*, 137 F.3d 616, 622
 8 (9th Cir. 1998); *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989) (same
 9 standard of review for Rule 12(b)(6) and Rule 12(c) motions). The court may, however, consider
 10 materials properly submitted as part of the complaint, *see Gumataotao*, 236 F.3d at 1083;
 11 *Cooper*, 137 F.3d at 622-23, as well as “document[s] the authenticity of which [are] not
 12 contested, and upon which the plaintiff’s complaint necessarily relies,” even if they are not
 13 attached to the complaint, *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *superseded
 14 by statute on other grounds as recognized in Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d
 15 676 (9th Cir. 2006); *see also Dunn v. Castro*, 621 F.3d 1196, 1204 n.6 (9th Cir. 2010); *Dent v.
 16 Cox Communications Las Vegas, Inc.*, 502 F.3d 1141, 1143 (9th Cir. 2007); *Lee v. City of Los
 17 Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

18 Because plaintiff’s complaint relies on DOC Policies 450.100, *see* Dkt. 11, the Court will
 19 consider defendants’ submission of these materials for purposes of ruling on this motion. Dkt. 8
 20 at Exhibit 1, Exhibit 2 because it is a “document the authenticity of which is not contested, and
 21 upon which the plaintiff’s complaint necessarily relies,” *Parrino v. FHP, Inc.*, 146 F.3d at 706.
 22 The Court notes that while plaintiff stated in his response that he had not been provided with a
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1 copy of DOC Policy 450.100 that was attached to defendants' motion, *see* Dkt. 17 at 2, he
2 acknowledges that he received a copy of the policy on December 30, 2015. Dkt. 20 at 1.

3 PROCEDURAL HISTORY

4 This case was removed from Thurston County Superior Court on November 3, 2015. Dkt.
5 1. Defendants filed their motion to dismiss on December 8, 2015. Dkt. 15. Plaintiff filed a
6 response, Dkt. 17, defendants filed a reply, Dkt. 18, and plaintiff filed a surreply, Dkt. 19, Dkt.
7 20. The Court notes that Dkt. 20 appears to be a duplicate of Dkt. 19, but that the text is easier to
8 read in Dkt. 20. Thus the Court will refer to Dkt. 20 in this report and recommendation.

9 STATEMENT OF FACTS

10 Plaintiff Brian David Matthews is a Washington state prisoner in the custody of the
11 Department of Corrections ("DOC") and is currently housed at SCCC. Dkt. 11 at 2.

12 According to plaintiff's complaint, on August 23, 2012, April 12, 2013, May 31, 2013,
13 March 13, 2015, and August 6, 2015, unidentified SCCC mailroom personnel, defendants John
14 Does, opened and returned to sender mail that was addressed to plaintiff. Dkt. 11 at 6-7. Plaintiff
15 alleges that he was never issued a rejection notice or other notification related to the returned
16 mail. *Id.* at 7. Plaintiff alleges that the mail was not marked or identified as "legal mail." *Id.*
17 Plaintiff alleges that the returned mail had a sticker or stamp affixed to the envelope which stated
18 that the mail was returned to the sender for not having a DOC inmate number on the envelope.
19 *Id.* at 8. Plaintiff alleges that the mail received on August 6, 2015 contained his DOC inmate
20 number but that the DOC inmate number was listed as part of the street address and was not
21 clearly labeled. *Id.* at 25.

22 Plaintiff alleges that on September 21, 2012, he filed a formal complaint with defendant
23 Glebe regarding the lack of notification of withholding mail. *Id.* at 8. Plaintiff alleges that
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1 defendant Glebe refused to take action. *Id.* Plaintiff alleges that on October 10, 2012 and June
2 18, 2013, plaintiff complained to defendant Warner, who also refused to take action. *Id.*

3 Plaintiff seeks a declaratory judgment, an order enjoining defendants from any further
4 violations, an order compelling defendants to issue written notice of withholding delivery of
5 incoming prisoner mail, punitive damages, compensatory damages, nominal damages, and
6 statutory attorney's fees. Dkt. 11 at 16-17.

7 DISCUSSION

8 To state a claim under 42 U.S.C. § 1983, at least two elements must be met: (1) the
9 defendant must be a person acting under color of state law and (2) his conduct must have
10 deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of
11 the United States. *Paratt v. Taylor*, 451 U.S. 527 (1981). A third element of causation is implicit
12 in the second element. *See Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274,
13 286-87 (1977); *Flores v. Pierce*, 617 F.2d 1386, 1390-91 (9th Cir. 1980), *cert denied*, 449 U.S.
14 875 (1980).

15 Defendants do not contend that plaintiff has failed to allege that defendants were acting
16 under color of state law at the time of the alleged incident. *See* Dkt. 15. Thus, the Court proceeds
17 to consider whether plaintiff has sufficiently alleged that defendants have deprived plaintiff of
18 his constitutional rights.

19 A. First Amendment

20 As an initial matter, the Court notes that defendants do not directly address plaintiff's
21 First Amendment claim in their motion to dismiss. *See* Dkt. 15. In their reply, defendants
22 contend that plaintiff's First Amendment claim and his claim that defendants have a pattern and
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1 practice of violating freedom of speech, Dkt. 11 at 10-13, is captured by defendants' response to
 2 plaintiff's due process claim.

3 The Court agrees and finds that plaintiff has not pled any facts showing that his speech or
 4 freedom of expression was restricted in any way. *See Procunier v. Martinez*, 416 U.S. 396, 417-
 5 19 (1974); *Krug v. Lutz*, 329 F.3d 692, 698 (9th Cir. 2003). Thus, the Court discusses plaintiff's
 6 allegations of First Amendment violations in relation to his due process claim.

7 **B. Fourteenth Amendment**

8 Plaintiff alleges that defendants violated his due process rights when his five pieces of
 9 incoming mail were returned to the sender and plaintiff did not receive a mail rejection notice.
 10 Dkt. 11 at 9-10. Defendants argue that plaintiff's claim fails because his mail was not rejected,
 11 but instead, it was returned to the sender and plaintiff was not prevented from receiving the mail.
 12 Dkt. 15 at 5-6.

13 "It is well-established that '[t]he requirements of procedural due process apply only to the
 14 deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and
 15 property.'" *Burnsworth v. Gunderson*, 179 F.3d 771, 774 (9th Cir. 1999) (*quoting Bd. of Regents*
 16 *of State Colleges v. Roth*, 408 U.S. 564, 569 (1972)). "Under *Sandin*, a prisoner possesses a
 17 liberty interest under the federal constitution when a change occurs in confinement that imposes
 18 an 'atypical and significant hardship . . . in relation to the ordinary incidents of prison life.'"
 19 *Resnick v. Hayes*, 213 F.3d 443, 448 (9th Cir. 2000) (*quoting Sandin v. Conner*, 515 U.S. 472,
 20 484 (1995)). "There is no single standard for determining whether a prison hardship is atypical
 21 and significant, and the 'condition or combination of conditions or factors [of the alleged
 22 hardship] . . . requires case by case, fact by fact consideration.'" *Ramirez v. Galaza*, 334 F.3d
 23 850, 861 (9th Cir. 2003) (*quoting Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996)). If the
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1 hardship is sufficiently significant, the court must then determine whether the procedures
 2 satisfied due process. *Sandin*, 515 U.S. at 484; *Keenan*, 83 F.3d at 1089.

3 When a prison rejects or returns mail to the sender because of the content of the mail, a
 4 prisoner's First Amendment rights are implicated and the prisoner is entitled to due process
 5 procedures. *Procunier v. Martinez*, 416 U.S. 396, 417–18 (1974) *overruled on other grounds by*
 6 *Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989). *See also Frost v. Symington*, 197 F.3d 348,
 7 353 (9th Cir. 1999) (prisoners have a “Fourteenth Amendment due process liberty interest in
 8 receiving notice that ... incoming mail is being withheld by prison authorities”). Thus, prisoners
 9 are protected from “arbitrary government invasion,” and any decision to censor or withhold
 10 delivery of mail must be accompanied by “minimum procedural safeguards.” *Martinez*, 416 U.S.
 11 at 418.

12 Where a prisoner's liberty interest has been implicated, the following minimum
 13 procedures are required: (1) notifying the inmate of the rejection of a letter; (2) allowing the
 14 author of the letter a reasonable opportunity to protest the decision; and (3) referring any
 15 complaints to a prison official other than the person who made the censorship decision. *Id.* The
 16 Ninth Circuit “has repeatedly acknowledged that withholding delivery of inmate mail must be
 17 accompanied by the minimum procedural safeguards” established in *Martinez*. *Krug v. Lutz*, 329
 18 F.3d 692, 697–98 (9th Cir. 2003) (*citing Sorrels v. McKee*, 290 F.3d 965, 972 (9th Cir. 2002)
 19 and *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001)).

20 On the other hand, courts have held that the return of mail because of defects apparent on
 21 the outside of the envelope, as opposed to security concerns raised by the content of the mail,
 22 does not implicate First Amendment or due process rights. *See Starr v. Knierman*, 474 Fed.
 23 App'x 785 (1st Cir. 2012) (holding that plaintiff failed to state a due process claim in alleging
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1 that a prison failed to provide him with notice and/or an opportunity to appeal return of his mail
 2 due to the use of a sticker on the envelope); *Sikorski v. Whorton*, 631 F. Supp. 2d 1327, 1348-49
 3 (D. Nev. 2009) (finding that defendants were not required to provide plaintiff with notice and an
 4 opportunity to appeal a decision to return mail to the sender for defects noticeable on the outside
 5 of the envelope); *Jeffries v. Snake River Corrections-Oregon*, 2008 WL 3200802 *1 (D. Or.
 6 2008) (same) *affirmed* 362 Fed. Appx. 587 (9th Cir. 2009) (affirmed regarding plaintiff's First
 7 Amendment claims on the basis that there were valid penological reasons for the policies in
 8 place).

9 Here, similar to the facts in *Jeffries*, *Starr*, and *Sikorski*, plaintiff alleges that his mail was
 10 opened and then returned to the sender because of defects apparent on the envelope, specifically
 11 the lack of a DOC inmate number. Dkt. 11 at 6-7. Plaintiff further asserts that there was a stamp
 12 or sticker on the envelope noting the reason for the return. *Id.* Although *Jeffries*, *Starr*, and
 13 *Sikorski* are not binding on this Court, the Court finds that those three cases are persuasive on
 14 this issue and that the return of mail based on a deficiency apparent on the envelope does not
 15 implicate plaintiff's First Amendment or due process rights. *See Starr*, 474 Fed. App'x 785;
 16 *Sikorski*, 631 F. Supp. 2d at 1348-49; *Jeffries*, 2008 WL 3200802 at *1. *But see Martinez*, 416
 17 U.S. at 417-18 (mail destroyed or withheld based on its content implicates First Amendment and
 18 due process rights). Plaintiff has not alleged that defendants opened his mail and returned it to
 19 the sender because of the content of the mail, but rather that the only reason for the return was
 20 the lack of the DOC inmate number on the envelope. As defendants point out, the sender could
 21 resend plaintiff's mail with the DOC inmate number clearly marked on the envelope and
 22 plaintiff's mail was never withheld or destroyed. Dkt. 15 at 6. Thus, the Court finds that plaintiff

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1 has failed to allege that the returned mail was a deprivation of life, liberty, or property requiring
2 due process.

3 Assuming all material allegations of the complaint are admitted and after liberally
4 construing the complaint in his favor, plaintiff has failed to allege facts sufficient to support his
5 Fourteenth Amendment due process claim and the claim should be dismissed. However, as
6 discussed below, plaintiff should be granted leave to amend his complaint.

7 **C. Personal Participation of Defendants Glebe, Warner, Pacholke, Gilbert, and
8 Sullivan**

9 Plaintiff alleges that defendants Glebe, Warner, Pacholke, Gilbert and Sullivan are liable
10 based on their positions within the DOC and/or SCCC and that they have a supervisory
11 responsibility for any conduct that occurs in the SCCC mailroom. Dkt. 11 at 3-4. Defendants
12 allege that even if plaintiff has stated a due process claim, plaintiff has failed to allege personal
13 participation of defendants Glebe, Warner, Pacholke, Gilbert and Sullivan. Dkt. 15 at 8-9. The
14 Court finds that plaintiff has failed to link the named defendants to any alleged constitutional
15 violation.

16 In order to obtain relief against a defendant under 42 U.S.C. §1983, a plaintiff must prove
17 that the particular defendant has caused or personally participated in causing the deprivation of a
18 particular protected constitutional right. *Arnold v. International Business Machines Corp.*, 637
19 F.2d 1350, 1355 (9th Cir. 1981); *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977). To be
20 liable for “causing” the deprivation of a constitutional right, the particular defendant must
21 commit an affirmative act, or omit to perform an act, that he or she is legally required to do, and
22 which causes the plaintiff’s deprivation. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

23 The inquiry into causation must be individualized and focus on the duties and
24 responsibilities of each individual defendant whose acts or omissions are alleged to have caused

1 a constitutional deprivation. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *see also Rizzo v.*
 2 *Goode*, 423 U.S. 362, 370-71, 375-77 (1976). Sweeping conclusory allegations against an
 3 official are insufficient to state a claim for relief. The plaintiff must set forth specific facts
 4 showing a causal connection between each defendant's actions and the harm allegedly suffered
 5 by plaintiff. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980); *Rizzo*, 423 U.S. at 371.

6 "A supervisor is only liable for the constitutional violations of . . . subordinates if the
 7 supervisor participated in or directed the violations, or knew of the violations and failed to act to
 8 prevent them. There is no respondeat superior liability under [§] 1983." *Taylor v. List*, 880 F.2d
 9 1040, 1045 (9th Cir. 1989) (citations omitted); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948
 10 (2009) ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must
 11 plead that each Government-official defendant, through the official's own individual actions, has
 12 violated the Constitution."); *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (holding that "a
 13 plaintiff may state a claim against a supervisor for deliberate indifference based upon the
 14 supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her
 15 subordinates").

16 Here, plaintiff has failed to allege sufficient facts to support a claim against defendants
 17 Glebe, Warner, Pacholke, Sullivan and Gilbert. Plaintiff alleges that defendant Warner was the
 18 former secretary of the DOC, defendant Pacholke is the current secretary of the DOC, defendant
 19 Glebe was the former superintendent of SCCC, defendant Gilbert is the current superintendent of
 20 the SCCC, and that defendant Sullivan is the sergeant of the SCCC mailroom. Dkt. 11 at 3-4.
 21 Plaintiff also alleges that these defendants were involved in responding to grievances regarding
 22 incoming mail, that they knew of the alleged returned mail, and that they generally violated
 23 plaintiff's civil rights. Dkt. 11 at 9-11.

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1 Even construing plaintiff's complaint liberally, he has not stated any facts to support his
 2 conclusory allegations these defendants knew of any allegedly unconstitutional conduct or that
 3 they acquiesced in any unconstitutional conduct. *See Starr*, 652 F.3d at 1207. Although plaintiff
 4 has alleged that he submitted grievances to defendants Glebe and Warner, there is no
 5 constitutionally protected right to a specific grievance procedure. *See Ramirez v. Galaza*, 334
 6 F.3d 850, 860 (9th Cir. 2003) (citing *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988)).
 7 Because there is no right to any particular grievance process, it is impossible for due process to
 8 have been violated by ignoring or failing to properly process grievances. While plaintiff's
 9 allegations may show that defendants Glebe and Warner were aware of plaintiff's complaints,
 10 the denial of grievances, in itself, is not a constitutional violation. Plaintiff has not alleged any
 11 specific facts showing any affirmative act was taken by defendants Glebe, Warner, Pacholke,
 12 Gilbert or Sullivan that caused any constitutional violation.

13 Thus, the Court finds that plaintiff has failed to allege personal participation by
 14 defendants Glebe, Warner, Pacholke, Gilbert, and Sullivan and the Court recommends that
 15 plaintiff's claims against these defendants be dismissed. As noted below, however, plaintiff
 16 should be given an opportunity to file an amended complaint to allege facts, if he can, that show
 17 personal participation of defendants Glebe, Warner, Pacholke, Gilbert and Sullivan in some
 18 alleged violation of plaintiff's constitutional rights. So far, he has not done so.

19 **D. DOC as Defendant and Damages Claims Against Defendants Glebe, Warner,
 20 Pacholke, Gilbert and Sullivan**

21 Plaintiff includes the DOC as a defendant in his civil rights claim. *See* Dkt. 11. Plaintiff
 22 also names defendants Glebe, Warner, Pacholke, Gilbert and Sullivan in their official capacities.
 23 Dkt. 11 at 4. Section 1983 creates a cause of action for a plaintiff whose constitutional rights
 24 have been violated by any "person" acting under color of law. 42 U.S.C. § 1983. However, for

1 the purposes of § 1983, a state is not a “person.” *See Arizonans for Official English v. Arizona*,
 2 520 U.S. 43, 69 (1997); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989). Similarly,
 3 an agency that is an arm of the state is also not a “person” under § 1983. *See Howlett v. Rose*,
 4 496 U.S. 356, 365 (1990); *also Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam)
 5 (concluding that the suit against the state Board of Corrections was barred by the Eleventh
 6 Amendment). In addition, a suit against a state official in his official capacity is no different
 7 from a suit against the State itself. *Doe v. Lawrence Livermore Nat. Lab.*, 131 F.3d 836, 839 (9th
 8 Cir. 1997) (“state officials sued in their official capacities are not ‘persons’ within the meaning
 9 of § 1983”).

10 Accordingly, the undersigned recommends that defendant DOC and any damages claims
 11 against defendants Glebe, Warner, Pacholke, Gilbert and Sullivan in their official capacities be
 12 dismissed.

13 **E. State Law Claims**

14 Plaintiff alleges that he has a due process claim under Article I, Section 3 of the
 15 Washington State Constitution. Dkt. 11 at 13. As defendants correctly point out, Washington
 16 does not have a civil rights act akin to 42 U.S.C. § 1983 and alleged violations of the
 17 Washington State Constitution are not independently actionable torts. Dkt. 15 at 10; *Reid v.*
 18 *Pierce County*, 136 Wn.2d 195, 213 (1998); *Spurrell v. Bloch*, 40 Wn. App. 854, 861-62 (1985)
 19 (Washington due process clause does not constitute an independent cause of action; state may
 20 invalidate actions which do not conform with due process but may not award reparations);
 21 *Systems Amusement v. State*, 7 Wn. App. 516 (1972). Moreover, Washington courts have
 22 consistently rejected invitations to establish a cause of action for damages based upon
 23 constitutional violations without “the aid of augmentative legislation.” *Blinka v. Washington*
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1 *State Bar Ass'n*, 109 Wn. App. 575, 591 (2001) (*citing Systems Amusement*, 7 Wn. App. at 517);
 2 *see also Spurrell v. Bloch*, 40 Wn. App. at 861-62; *Reid*, 136 Wn.2d at 213.

3 In light of the lack of legislative guidance on the issue, and considering Washington
 4 courts' consistent refusals to recognize a cause of action in tort for constitutional violations, a
 5 state law constitutional claim cannot stand. Plaintiff may pursue his § 1983 claim under the U.S.
 6 Constitution. Dismissal of plaintiff's state constitutional claims will not remove any remedies
 7 from the plaintiff in this action. Thus, the Court recommends that plaintiff's claims with respect
 8 to violations under the Washington State Constitution be dismissed.

9 **F. Negligence Claims**

10 Plaintiff alleges that defendants Sullivan, Glebe and Warner were negligent in failing to
 11 prevent the alleged constitutional violations. Dkt. 11 at 14-15. However, plaintiff has not stated a
 12 cognizable claim under § 1983. *See Davidson v. Cannon*, 474 U.S. 344, 347 (1986) (That the
 13 plaintiff may have suffered harm, even if due to another's negligent conduct, does not in itself
 14 necessarily demonstrate an abridgment of constitutional protections.); *Daniels v. Williams*, 474
 15 U.S. 327 (1986). Thus, the Court recommends that any negligence claims against defendants be
 16 dismissed.

17 **G. Leave to Amend Complaint**

18 Based on the complaint currently before the Court, defendants are entitled to have their
 19 motion to dismiss granted as to all of plaintiff's claims. However, the Ninth Circuit has
 20 established that pro se litigants bringing civil rights actions must be given an opportunity to
 21 amend their complaint to overcome deficiencies unless it is clear that such deficiencies cannot be
 22 overcome by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000). Plaintiff may be
 23 able to overcome the deficiencies of his pleading if he is given an opportunity to amend his due
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1 process claim. Plaintiff should be given the opportunity to allege facts, if he can, to support a due
2 process claim and from which it may be inferred that defendants Warner, Glebe, Pacholke,
3 Gilbert and Sullivan violated his due process rights.

4 **CONCLUSION**

5 For the reasons set forth above, the Court recommends granting defendants' motion but
6 allowing plaintiff leave to amend his complaint with respect to his due process claim and
7 personal participation of defendants Glebe, Warner, Pacholke, Gilbert, and Sullivan. The Court
8 recommends that plaintiff's amended complaint be filed by a date set by the Court. The Court
9 recommends granting defendants' motion to dismiss as to all other claims without leave to
10 amend.

11 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
12 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.
13 6. Failure to file objections will result in a waiver of those objections for purposes of appeal.
14 *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the
15 Clerk is directed to set the matter for consideration on **February 12, 2016** as noted in the
16 caption.

17 Dated this 21st day of January, 2016.

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20 J. Richard Creatura
21 United States Magistrate Judge
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